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Utah Department of Corrections v. Career Service Review Board : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

UTAH DEPARTMENT OF CORRECTIONS,	:	
Petitioner,	:	Case No 940179-CA
v.	:	
CAREER SERVICE REVIEW BOARD and	:	Priority No. 14
MICHAEL DEAN HUMMEL,	:	
Respondents.	:	

ADDENDUM TO BRIEF OF APPELLEE

PETITION FOR REVIEW OF DECISION AND FINAL AGENCY ACTION OF
THE CAREER SERVICE REVIEW BOARD

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UTAH COURT OF AP.
BRIEF

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ADDENDUM 1

hearing officer shall give deference to the decision of the agency or the appointing authority unless the agency's penalty is determined to be excessive, disproportionate or constitutes an abuse of discretion in which instance the CSRB hearing officer shall determine the appropriate remedy.

D. Discretion. Upon commencement, the hearing officer shall announce that the hearing is convened and is henceforth on the record. The hearing officer shall note appearances for the record and shall determine which party has the burden of moving forward.

E. Closing of the Record. After all testimony, documentary evidence, and arguments have been presented, the hearing officer shall close the record and terminate the proceeding, unless one or both parties agree to submit a posthearing brief within a specified time.

F. Posthearing Briefs. When posthearing briefs or memoranda of law are scheduled to be submitted, the record shall remain open until the briefs are received by the hearing officer and incorporated into the record, or until the time to receive such briefs has expired. After receipt of posthearing documents, or upon the expiration of the time to receive posthearing documents, the case is then taken under advisement, and the tolling period commences for the issuance of the written decision.

G. Findings of Fact, Conclusions of Law. Following the closing of the record, the hearing officer shall make and enter a written decision containing findings of fact and conclusions of law. The decision and order is filed with the administrator and without further action becomes the decision and order of the evidentiary hearing.

H. Disseminating Decisions. The administrator shall disseminate copies of the decision and order to the persons of record for each party.

I. Past Work Record. In those proceedings where a disciplinary penalty is at issue, the past employment record of the employee is relevant for purposes of either mitigating or sustaining the penalty in the event that the employee is found guilty of the disciplinary charge alleged.

J. Scope of Remedy/Relief. If the hearing officer finds that the action complained of which was taken by the appointing authority was too severe, even though for good cause, the hearing officer may provide for such other remedy or relief as deemed appropriate and in the best interest of the respective parties.

K. Compliance and Enforcement. State agencies and officials are expected to comply with decisions and orders issued by a hearing officer, unless an appeal is taken to the appellate/step 6 level. Enforcement measures available to the board include: (1) involving the governor, who may remove most state officers with or without cause, and with respect to those who can only be removed for cause, refusal to obey a lawful order may constitute sufficient cause for removal; (2) a mandamus order to compel the official to obey the order; and (3) the charge of a Class A misdemeanor.

L. No Rehearings. Rehearings are not permitted.

M. Reconsideration. A request for a reconsideration may be made in writing within ten working days after the date that an evidentiary/step 5 decision is received by the party. The written request is to contain specific reasons as to why a reconsideration is warranted with respect to the factual findings and conclusions of the evidentiary/step 5 decision. The original hearing officer shall decide on the propriety of a reconsideration. A request for reconsideration is filed

with the administrator. Any appeal to the board from a reconsideration by the original hearing officer must be filed with the administrator within ten working days upon receipt of the reconsideration.

R137-1-21. The Board and the Appellate Procedure.

A. Transcript Production. The party appealing the hearing officer's decision to the board at the appellate/step 6 level shall order production of the evidentiary/step 5 proceeding's transcript from the court reporter. The appellant shall share an equal payment with the CSRB Office to the court reporting firm.

1. Transcript production cost-sharing applies only to the appellant and to the CSRB Office. The former receives the transcript original; the latter receives a transcript copy.

2. The respondent may inquire of the CSRB Office about obtaining a transcript copy, or may directly purchase a copy from the court reporting firm.

B. Briefs. An appeal hearing before the board is based upon the evidentiary record previously established by the hearing officer. No additional or new evidence is permitted unless compelled by the board.

1. The appellant in a step 6 proceeding must obtain the transcript of the step 5 hearing. After receipt of the transcript, the appellant has a ten working-day period to file six copies of a brief with the administrator. Additionally, the respondent must be provided with a copy of the appellant's brief.

2. Upon receipt of a copy of the appellant's brief, the respondent then has a ten working-day period to file six copies of a reply brief with the administrator.

3. Briefs are distributed to board members upon receipt from both parties.

4. All briefs shall be hand delivered, sent by the U.S. Postal Service postage prepaid, or sent through the state's Central Mailing.

5. Briefs shall be date-stamped upon receipt in the CSRB Office.

6. The time frame for receiving briefs shall be modified or waived only for good cause as determined by the administrator.

C. Rules of Procedure. The following rules are applicable to appeal hearings before the board:

1. Dismissal of Appeal. Upon a motion by either party or upon its own motion, the board may dismiss any appeal prior to holding a formal appeal hearing if the appeal is clearly moot, without merit, not properly filed, or not within the scope of the board's authority.

2. Notice. Written notice of the date, time, place, and issues for hearing by the board shall be given to the aggrieved employee, to the employee's counsel or representative, to the agency, and to the agency's counsel or representative, at least five days before the date set for the hearing.

3. Compelling Evidence. The board may compel evidence in the conduct of its appeals.

4. Oral Argument/Time Limitation. As a general rule, the board restricts the oral argument to 30 minutes, or less, per party. The board may grant additional time as it deems appropriate.

5. Oral Argument Set Aside. If the board determines that oral argument is unnecessary, the parties shall be so notified, but they may be expected to appear before the board at the date, time, and place set in order to answer any questions raised by the board members.

6. Argument or Memoranda. Oral argument or written memoranda may be required of the parties at the board's discretion.

D. The Board's Standards of Review. The board's standards of review shall be based upon the following criteria:

1. The board shall first make a determination of whether the factual findings of the CSRB hearing officer are reasonable and rational in accordance with the substantial evidence standard. If the board determines that the factual findings of the CSRB hearing officer are not reasonable and rational based on the evidentiary/step 5 record as a whole, then the board may, in its discretion, correct the factual findings, and/or make new or additional factual findings.

2. Once the board has either determined that the factual findings of the CSRB hearing officer are reasonable and rational or has corrected the factual findings based upon the evidentiary/step 5 record as a whole, the board must then determine whether the CSRB hearing officer has correctly applied the relevant policies, rules, and statutes in accordance with the correctness standard, with no deference being granted to the evidentiary/step 5 decision of the CSRB hearing officer.

3. Finally, the board must determine whether the decision of the CSRB hearing officer, including the totality of the sanctions imposed by the agency, is reasonable and rational based upon the ultimate factual findings and correct application of relevant policies, rules, and statutes determined in accordance with the above provisions.

E. Appeal Hearing Record. The proceeding before the board shall be reported by a certified court reporter, or in exceptional circumstances by a recording machine.

F. Appellate Review. Upon a party's application for review of the hearing officer's evidentiary decision, the board's decision shall be based upon a review of the record, including briefs and oral arguments presented at step 6, and no further evidentiary hearing will be held unless otherwise ordered by the board.

G. Remand. Until the board's decision is final, the board may remand the case to the original hearing officer for the purpose of taking additional evidence, as appropriate.

H. Appellate Decisions. The board's decisions shall be issued pursuant to the following rules:

1. The decision of the board shall be transmitted in writing to the employee and to the employing agency, and shall be final in terms of administrative review. The board may, at its discretion, release to the parties its determination orally prior to issuance of its official written decision.

2. The board's decision is binding on the agency that is a party to the appeal unless overturned or modified by the Court of Appeals.

3. The board may affirm, reverse, adopt, modify, supplement, amend, or vacate the hearing officer's decision, either in whole or in part, and may remand the matter to the hearing officer with instructions or may make any other appropriate disposition of the appeal.

I. Rehearings. Rehearings before the board are not permitted.

J. Reconsideration. Any request for reconsideration of a previously issued written decision by the board shall be subject to the following conditions: (1) Reconsideration requests shall be in writing, shall be filed with the CSRB Office within ten working days upon the party's receipt of the board's appeal hearing decision, and shall contain specific reasons as to why a reconsideration is warranted with respect to the board's factual findings and conclusions, and the circumstances of the case (2) The board has discretion

to decide whether it may reconsider any previously adjudicated matter. (3) The board shall only grant a reconsideration if appropriate justification is offered. (4) If the board agrees to the petitioner's request, the board's reconsideration response shall be in writing, with no further hearing or proceeding. (5) Any appeal from a board-issued reconsideration to the Court of Appeals, shall be filed pursuant to Section 63-46b-14(3)(a).

K. Appeals to Court. Within 30 calendar days from issuance of a board decision and order, the petitioning party may seek judicial review of the board's decision with the Court of Appeals.

L. Transcript Fee. The party petitioning the Court of Appeals for a review shall bear all costs of transcript production for the appellate proceeding/step 6. The CSRB Office may not share any cost for a transcript of the appeal hearing. The petitioning party shall also provide a copy of the appeal hearing's transcript to the responding party.

R137-1-22. Declaratory Orders.

This rule provides a procedure for the submission and review of requests for and disposition of declaratory rulings pertaining to the applicability of statutes, administrative rules, and orders either governing or issued by the board or the administrator.

A. Applicability. The applicability of a declaratory order refers to the determination of whether a statute, rule, or order should be applied, and if so, how the law should be applied to the facts.

B. Petition Procedure. Any person or agency with proper standing may petition for a declaratory ruling.

1. The petition shall be addressed and delivered to the administrator.

2. The petition shall be date-stamped upon receipt in the CSRB Office.

C. Petition Form. The petition shall:

1. be clearly designated as a request for a declaratory order;

2. identify the statute, rule, or order to be reviewed;

3. describe the circumstances in which applicability is to be reviewed;

4. describe the reason or need for the applicability review;

5. include an address and telephone number where the petitioner can be reached during regular work days; and

6. be signed by the petitioner.

D. Petition Review and Disposition. As appropriate the administrator or the board:

1. shall review and consider the petition;

2. shall prepare a declaratory ruling, stating: (a) the applicability or nonapplicability of the statute, rule, or order at issue; (b) the reasons for the applicability or nonapplicability of the statute, rule, or order; and (c) any requirements imposed on a petitioning person or agency, or any other person according to the ruling; and

3. may: (a) interview the petitioner or the agency representative; (b) hold a public hearing on the petition; (c) consult with legal counsel or the Attorney General; or (d) take any action which the board, in its judgment, deems necessary in order to provide the petition with an adequate review and due consideration.

E. Time Frame and Service. The board or the administrator shall prepare the declaratory ruling without unnecessary delay and shall send the petitioner a copy of the ruling by the U.S. Postal Service, postage prepaid, or by the state's Central Mailing as appropriate, or shall send the petitioner notice of

ADDENDUM 2

(b) The Utah Rules of Evidence apply in judicial proceedings under this section.

History: C. 1953, 63-46b-15, enacted by L. 1987, ch. 161, § 271; 1988, ch. 72, § 25.

Amendment Notes. — The 1988 amendment, effective April 25, 1988, deleted "except that final agency action from informal adjudicative proceedings based on a record shall be reviewed by the district courts on the record

according to the standards of Subsection 63-46b-16(4)" at the end in Subsection (1)(a) and made minor stylistic changes.

Effective Dates. — Laws 1987, ch. 161, § 315 makes the act effective on January 1, 1988.

NOTES TO DECISIONS

Function of district court.

Section 63-46b-16(1) provides that all final agency decisions through formal adjudicative proceedings will be reviewed by the Utah Supreme Court or Court of Appeals. Therefore,

the district court will no longer function as intermediate appellate court except to review informal adjudicative proceedings de novo pursuant to Subsection (1)(a) of this section. In re Topik, 761 P.2d 32 (Utah Ct. App. 1988).

63-46b-16. Judicial review — Formal adjudicative proceedings.

(1) As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicative proceedings.

(2) (a) To seek judicial review of final agency action resulting from formal adjudicative proceedings, the petitioner shall file a petition for review of agency action with the appropriate appellate court in the form required by the appellate rules of the appropriate appellate court.

(b) The appellate rules of the appropriate appellate court shall govern all additional filings and proceedings in the appellate court.

(3) The contents, transmittal, and filing of the agency's record for judicial review of formal adjudicative proceedings are governed by the Utah Rules of Appellate Procedure, except that:

(a) all parties to the review proceedings may stipulate to shorten, summarize, or organize the record;

(b) the appellate court may tax the cost of preparing transcripts and copies for the record:

(i) against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record; or

(ii) according to any other provision of law.

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

(a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;

(b) the agency has acted beyond the jurisdiction conferred by any statute;

(c) the agency has not decided all of the issues requiring resolution;

(d) the agency has erroneously interpreted or applied the law;

(e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;

(f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

(h) the agency action is:

(i) an abuse of the discretion delegated to the agency by statute;

(ii) contrary to a rule of the agency;

(iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or

(iv) otherwise arbitrary or capricious.

History: C. 1953, 63-46b-16, enacted by L. 1987, ch. 161, § 272; 1988, ch. 72, § 26.

Amendment Notes. — The 1988 amendment, effective April 25, 1988, substituted "As provided by statute, the Supreme Court or the Court of Appeals" for "The Supreme Court or other appellate court designated by statute" in Subsection (1); inserted "with the appropriate

appellate court" in Subsection (2)(a); and substituted "appellate rules of the appropriate appellate court" for "Utah Rules of Appellate Procedure" in Subsections (2)(a) and (2)(b).

Effective Dates. — Laws 1987, ch. 161, § 315 makes the act effective on January 1, 1988.

NOTES TO DECISIONS

Function of district court.

Subsection (1) provides that all final agency decisions through formal adjudicative proceedings will be reviewed by the Utah Supreme Court or Court of Appeals. Therefore, the dis-

trict court will no longer function as intermediate appellate court except to review informal adjudicative proceedings de novo pursuant to § 63-46b-15(1)(a). In re Topik, 761 P.2d 32 (Utah Ct. App. 1988).

63-46b-17. Judicial review — Type of relief.

(1) (a) In either the review of informal adjudicative proceedings by the district court or the review of formal adjudicative proceedings by an appellate court, the court may award damages or compensation only to the extent expressly authorized by statute.

(b) In granting relief, the court may:

(i) order agency action required by law;

(ii) order the agency to exercise its discretion as required by law;

(iii) set aside or modify agency action;

(iv) enjoin or stay the effective date of agency action; or

(v) remand the matter to the agency for further proceedings.

(2) Decisions on petitions for judicial review of final agency action are reviewable by a higher court, if authorized by statute.

History: C. 1953, 63-46b-17, enacted by L. 1987, ch. 161, § 273.

Effective Dates. — Laws 1987, ch. 161,

§ 315 makes the act effective on January 1, 1988.

ADDENDUM 3

- (3) refuse to submit to a drug or alcohol test under Section 67-19-36. 1990

67-19-34. Rulemaking power to executive director.

In accordance with this chapter and Title 63, Chapter 46a, Utah Administrative Rulemaking Act, the executive director shall make rules regulating:

- (1) disciplinary actions for employees subject to discipline under Section 67-19-37;
- (2) the testing of employees for the use of controlled substances or alcohol as provided in Section 67-19-36;
- (3) the confidentiality of drug testing and test results performed under Section 67-19-36 in accordance with Title 63, Chapter 2, Government Records Access and Management Act; and
- (4) minimum blood levels of alcohol or drug content for work effectiveness of an employee. 1991

67-19-35. Reporting of convictions under federal and state drug laws.

- (1) An employee who is convicted under a federal or state criminal statute regulating the manufacture, distribution, dispensation, possession, or use of a controlled substance shall report the conviction to the director of his agency within five calendar days after the date of conviction.
- (2) Upon notification either under Subsection (1) or otherwise, the director of the agency shall notify the federal agency for which a contract is being performed within ten days after receiving notice. 1990

67-19-36. Drug testing of state employees.

- (1) Except as provided in Subsection (2), when there is reasonable suspicion that an employee is using a controlled substance or alcohol unlawfully during work hours, an employee may be required to submit to medically accepted testing procedures for a determination of whether the employee is using a controlled substance or alcohol in violation of this part.
- (2) In highly sensitive positions, as identified in department class specifications, random drug testing of employees may be conducted by an agency in accordance with the rules of the executive director.
- (3) All drug or alcohol testing shall be:
 - (a) conducted by a federally certified and licensed physician, a federally certified and licensed medical clinic, or testing facility federally certified and licensed to conduct medically accepted drug testing;
 - (b) conducted in accordance with the rules of the executive director made under Section 67-19-34; and
 - (c) kept confidential in accordance with the rules of the executive director made in accordance with Section 67-19-34.
- (4) A physician, medical clinic, or testing facility may not be held liable in any civil action brought by a party for:
 - (a) performing or failing to perform a test under this section;
 - (b) issuing or failing to issue a test result under this section; or
 - (c) acting or omitting to act in any other way in good faith under this section. 1990

67-19-37. Discipline of employees.

An employee shall be subject to the rules of discipline of the executive director made in accordance with Section 67-19-34, if he:

- (1) refuses to submit to testing procedures provided in Section 67-19-36;
- (2) refuses to complete a drug rehabilitation program in accordance with Subsection 67-19-38(3);
- (3) is convicted under a federal or state criminal statute regulating the manufacture, distribution, dispensation, possession, or use of a controlled substance; or
- (4) manufactures, dispenses, possesses, uses, or distributes a controlled substance in violation of state or federal law during work hours or on state property. 1990

67-19-38. Violations and penalties.

In addition to other criminal penalties provided by law, an employee who:

- (1) fails to notify his director under Section 67-19-35 is subject to disciplinary proceedings as established by the executive director by rule in accordance with Section 67-19-34;
- (2) refuses to submit to testing procedures provided for in Section 67-19-36, may be suspended immediately without pay pending further disciplinary action as set forth in the rules of the executive director in accordance with Section 67-19-34;
- (3) tests positive for the presence of unlawfully used controlled substances or alcohol may be required, as part of his disciplinary treatment, to complete a drug rehabilitation program at his expense within 60 days after receiving the positive test results or be subject to further disciplinary procedures established by rule of the executive director in accordance with Section 67-19-34. 1990

67-19-39. Exemptions.

Peace officers, as defined under Section 77-1a-1, acting in their official capacity as peace officers in undercover roles and assignments, are exempt from the provisions of this act. 1990

67-19-40. State benefits for servicemembers activated due to Operation Desert Shield and Operation Desert Storm.

- (1) All agencies may continue to pay, for employees activated due to Operation Desert Shield and Operation Desert Storm, their portion of:
 - (a) the premium for health and dental insurance; and
 - (b) the premium for the basic life insurance provided by the state.
- (2) All agencies may also grant the 15-day military leave for employees activated due to Operation Desert Shield and Operation Desert Storm. 1991

CHAPTER 19a

GRIEVANCE AND APPEAL PROCEDURES

Part 1

General Provisions

Section
67-19a-101. Definitions.

Part 2

Career Service Review Board

67-19a-201. Career Service Review Board created
— Members — Appointment — Re-

Section

- removal — Terms — Organization — Compensation.
 67-19a-202. Powers — Jurisdiction.
 67-19a-203. Rulemaking authority.
 67-19a-204. Administrator — Powers.

Part 3**Grievance and Appeal Procedures**

- 67-19a-301. Charges submissible under grievance and appeals procedure.
 67-19a-302. Levels of appealability of charges submissible under grievance and appeals procedure.
 67-19a-303. Employees' rights in grievance and appeals procedure.

Part 4**Procedural Steps to Be Followed by Aggrieved Employee**

- 67-19a-401. Time limits for submission of appeal by aggrieved employee — Voluntary termination of employment — Group grievances.
 67-19a-402. Procedural steps to be followed by aggrieved employee.
 67-19a-403. Appeal to administrator — Jurisdictional hearing.
 67-19a-404. Administrator's responsibilities.
 67-19a-405. Prehearing conference.
 67-19a-406. Procedural steps to be followed by aggrieved employee — Hearing before hearing officer — Evidentiary and procedural rules.
 67-19a-407. Appeal to Career Service Review Board.
 67-19a-408. Career Service Review Board hearing — Evidentiary and procedural rules.

PART 1**GENERAL PROVISIONS****67-19a-101. Definitions.**

As used in this chapter:

- (1) "Administrator" means the person employed by the board to assist in administering personnel policies.
- (2) "Board" means the Career Service Review Board created by this chapter.
- (3) "Career service employee" means a person employed in career service as defined in Section 67-19-3.
- (4) "Employer" means the state of Utah and all supervisory personnel vested with the authority to implement and administer the policies of the department.
- (5) "Grievance" means:
 - (a) a complaint by a career service employee concerning any matter touching upon the relationship between the employee and his employer; and
 - (b) any dispute between a career service employee and his employer.
- (6) "Supervisor" means the person to whom an employee reports and who assigns and oversees the employee's work.

1991

PART 2**CAREER SERVICE REVIEW BOARD****67-19a-201. Career Service Review Board created — Members — Appointment — Removal — Terms — Organization — Compensation.**

(1) There is created a Career Service Review Board.

(2) (a) The governor, with the advice and consent of the Senate, shall appoint five members to the board no more than three of which are members of the same political party.

(b) The governor shall appoint members whose gender and ethnicity represent the career service work force.

(c) The governor may remove any board member for cause and appoint a replacement to complete the unexpired term of the member removed for cause.

(3) The governor shall ensure that appointees to the board:

(a) are qualified by knowledge of employee relations and merit system principles in public employment; and

(b) are not:

(i) members of any local, state, or national committee of a political party;

(ii) officers or members of a committee in any partisan political club; and

(iii) holding or a candidate for a paid public office.

(4) (a) The governor shall appoint board members to serve four-year terms as follows:

(i) three members shall be appointed to a term beginning and ending with the governor's term; and

(ii) two members shall be appointed to four-year terms beginning January 1 of the third year of the governor's regular term in office.

(b) The members of the board shall serve until their successors are appointed and qualified.

(c) Persons serving on the board as of the effective date of this act may complete the term for which they were appointed.

(d) If a vacancy occurs on the board, the governor may appoint a new person to fill the unexpired term.

(5) Each year, the board shall choose a chairman and vice-chairman from its own members.

(6) (a) Three members of the board are a quorum for the transaction of business.

(b) Action by a majority of members when a quorum is present is action of the board.

(7) Members of the board shall serve without compensation, but they may be reimbursed for expenses incurred in the performance of their official duties as established by the Division of Finance.

1989

67-19a-202. Powers — Jurisdiction.

(1) (a) The board shall serve as the final administrative body to review appeals from career service employees and agencies of decisions about promotions, dismissals, demotions, suspensions, written reprimands, wages, salary, violations of personnel rules, issues concerning the equitable administration of benefits, reductions in force, and disputes concerning abandonment of position that have not been resolved at an earlier stage in the grievance procedure.

- (b) The board has no jurisdiction to review or decide any other personnel matters.
- (2) The time limits established in this chapter supersede the procedural time limits established in Title 63, Chapter 46b, Administrative Procedures Act.
- (3) In conjunction with any inquiry, investigation, hearing, or other proceeding, any member of the board may:
 - (a) administer oaths;
 - (b) certify official acts;
 - (c) subpoena witnesses, documents, and other evidence; and
 - (d) grant continuances pursuant to board rule.

1991

67-19a-203. Rulemaking authority.

The board may make rules governing:

- (1) definitions of terms, phrases, and words used in the grievance process established by this chapter;
- (2) what matters constitute excusable neglect for purposes of the waiver of time limits established by this chapter;
- (3) the application for and service of subpoenas, the service and filing of pleadings, and the issuance of rulings, orders, determinations, summary judgments, transcripts, and other legal documents necessary in grievance proceedings;
- (4) the use, calling, attendance, participation, and fees of witnesses in grievance proceedings;
- (5) continuances of grievance proceedings;
- (6) procedures in jurisdictional and evidentiary hearings, unless governed by Title 63, Chapter 46b, the Administrative Procedures Act;
- (7) the presence of media representatives at grievance proceedings; and
- (8) procedures for sealing files or making data pertaining to a grievance unavailable to the public.

1989

67-19a-204. Administrator — Powers.

- (1) The board shall employ a person with demonstrated ability to administer personnel policies to assist it in performing the functions specified in this chapter.
- (2) (a) The administrator may:
 - (i) assign qualified, impartial hearing officers on a per case basis to adjudicate matters under the jurisdiction of the board;
 - (ii) subpoena witnesses, documents, and other evidence in conjunction with any inquiry, investigation, hearing, or other proceeding; and
 - (iii) upon motion made by a party or person to whom the subpoena is directed and upon notice to the party who issued the subpoena, quash or modify the subpoena if it is unreasonable, requires an excessive number of witnesses, or requests evidence not relevant to any matter in issue.
- (b) In selecting and assigning hearing officers under authority of this section, the administrator shall appoint hearing officers that have demonstrated by education, training, and experience the ability to adjudicate and resolve personnel administration disputes by applying employee relations principles within a large, public work force.

1991

PART 3**GRIEVANCE AND APPEAL PROCEDURES****67-19a-301. Charges submissible under grievance and appeals procedure.**

- (1) This grievance procedure may only be used by career service employees who are not;

- (a) public applicants for a position with the state's work force;
- (b) public employees of the state's political subdivisions;
- (c) public employees covered by other grievance procedures; or
- (d) employees of state institutions of higher education.

(2) Whenever a question or dispute exists as to whether an employee is qualified to use this grievance procedure, the administrator shall resolve the question or dispute. The administrator's decision is reviewable only by the Court of Appeals.

(3) Any career service employee may submit a grievance based upon a claim or charge of injustice or oppression, including dismissal from employment, resulting from an act, occurrence, omission, or condition for solution through the grievance procedures set forth in this chapter.

1991

67-19a-302. Levels of appealability of charges submissible under grievance and appeals procedure.

(1) A career service employee may grieve promotions, dismissals, demotions, suspensions, written reprimands, wages, salary, violations of personnel rules, issues concerning the equitable administration of benefits, reductions in force, and disputes concerning abandonment of position to all levels of grievance procedure.

(2) (a) A career service employee may grieve all other matters only to the level of his department head.

(b) The decision of the department head is final and unappealable to the board.

1991

67-19a-303. Employees' rights in grievance and appeals procedure.

(1) For the purpose of processing a grievance, a career service employee may:

- (a) obtain assistance by a representative of the employee's choice to act as an advocate at any level of the grievance procedure;
- (b) request a reasonable amount of time during work hours to confer with the representative and prepare the grievance; and
- (c) call other employees as witnesses at a grievance hearing.

(2) The state shall allow employees to attend and testify at the grievance hearing as witnesses if the employee has given reasonable advance notice to his immediate supervisor.

(3) No person may take any reprisals against any career service employee for use of grievance procedures specified in this chapter.

(4) (a) The employing agency of an employee who files a grievance may not place grievance forms, grievance materials, correspondence about the grievance, agency and department replies to the grievance, or other documents relating to the grievance in the employee's personnel file.

(b) The employing agency of an employee who files a grievance may place records of disciplinary action in the employee's personnel file.

(c) If any disciplinary action against an employee is rescinded through the grievance procedures established in this chapter, the agency and the Department of Human Resource Management shall remove the record of the disciplinary action from the employee's agency personnel file and central personnel file.

(d) An agency may maintain a separate grievance file relating to an employee's grievance, but shall discard the file after three years. 1991

PART 4

PROCEDURAL STEPS TO BE FOLLOWED BY AGGRIEVED EMPLOYEE

67-19a-401. Time limits for submission of appeal by aggrieved employee — Voluntary termination of employment — Group grievances.

(1) Subject to the standing requirements contained in Part 3 and the restrictions contained in this part, a career service employee may have a grievance addressed by following the procedures specified in this part.

(2) The employee and the person to whom the grievance is directed may agree in writing to waive or extend grievance steps 2, 3, or 4 or the time limits specified for those grievance steps, as outlined in Section 67-19a-402.

(3) Any writing made pursuant to Subsection (2) must be submitted to the administrator.

(4) (a) Unless the employee meets the requirements for excusable neglect established by rule, if the employee fails to process the grievance to the next step within the time limits established in this part, he has waived his right to process the grievance or to obtain judicial review of the grievance.

(b) Unless the employee meets the requirements for excusable neglect established by rule, if the employee fails to process the grievance to the next step within the time limits established in this part, the grievance is considered to be settled based on the decision made at the last step.

(5) (a) Unless the employee meets the requirements for excusable neglect established by rule, an employee may submit a grievance for review under this chapter only if the employee submits the grievance:

(i) within 20 working days after the event giving rise to the grievance; or

(ii) within 20 working days after the employee has knowledge of the event giving rise to the grievance.

(b) Notwithstanding Subsection (4)(a), an employee may not submit a grievance more than one year after the event giving rise to the grievance.

(6) A person who has voluntarily terminated his employment with the state may not submit a grievance after he has terminated his employment.

(7) (a) When several employees allege the same grievance, they may submit a group grievance by following the procedures and requirements of this chapter.

(b) In submitting a group grievance, each aggrieved employee shall sign the complaint.

(c) The administrator and board may not treat a group grievance as a class action, but may select one aggrieved employee's grievance and address that grievance as a test case. 1991

67-19a-402. Procedural steps to be followed by aggrieved employee.

(1) (a) A career service employee who believes he has a grievance shall attempt to resolve the

grievance through discussion with his supervisor.

(b) Within five days after the employee discusses the grievance with him, the employee's supervisor may issue a verbal decision on the grievance.

(2) (a) If the grievance remains unanswered for five working days after its submission, or if the aggrieved employee is dissatisfied with the supervisor's verbal decision, the employee may re-submit the grievance in writing to his immediate supervisor within five working days after the expiration of the period for response or receipt of the decision, whichever is first.

(b) Within five working days after the employee's written grievance is submitted, the employee's supervisor shall issue a written response to the grievance stating his decision and the reasons for the decision.

(c) Immediately after submitting the written grievance to his supervisor, the employee shall notify the administrator of the board that he has submitted the written grievance.

(3) (a) If the written grievance submitted to the employee's supervisor remains unanswered for five working days after its submission, or if the aggrieved employee is dissatisfied with the decision issued, the employee may submit the grievance in writing to his agency or division director within ten working days after the expiration of the period for decision or receipt of the decision, whichever is first.

(b) Within five working days after the employee's written grievance is submitted, the employee's agency or division director shall issue a written response to the grievance stating his decision and the reasons for the decision.

(4) (a) If the written grievance submitted to the employee's agency or division director remains unanswered for five working days after its submission, or if the aggrieved employee is dissatisfied with the decision issued, the employee may submit the grievance in writing to his department head within ten working days after the expiration of the period for decision or receipt of the decision, whichever is first.

(b) Within ten working days after the employee's written grievance is submitted, the department head shall issue a written response to the grievance stating his decision and the reasons for the decision.

(c) The decision of the department head is final in all matters except those matters that the board may review under the authority of Part 3.

(5) If the written grievance submitted to the employee's department head meets the subject matter requirements of Section 67-19a-302 and if the grievance remains unanswered for ten working days after its submission, or if the aggrieved employee is dissatisfied with the decision issued, the employee may submit the grievance in writing to the administrator within ten working days after the expiration of the period for decision or receipt of the decision, whichever is first. 1991

67-19a-403. Appeal to administrator — Jurisdictional hearing.

(1) At any time after a career service employee submits a grievance to the administrator under the authority of Section 67-19a-402, the administrator may attempt to settle the grievance informally by,

conference, conciliation, and persuasion with the employee and the agency.

(2) (a) When an employee submits a grievance to the administrator under the authority of Section 67-19a-402, the administrator shall determine:

- (i) whether or not the employee is a career service employee and is entitled to use the grievance system;
- (ii) whether or not the board has jurisdiction over the grievance;
- (iii) whether or not the employee has been directly harmed; and
- (iv) the issues to be heard.

(b) In order to make the determinations required by Subsection (2), the administrator may:

- (i) hold a jurisdictional hearing, where the parties may present oral arguments, written arguments, or both; or
- (ii) conduct an administrative review of the file.

(3) (a) If the administrator holds a jurisdictional hearing, he shall issue his written decision within 15 days after the hearing is adjourned.

(b) If the administrator chooses to conduct an administrative review of the file, he shall issue his written decision within 15 days after he receives the grievance.

1991

67-19a-404. Administrator's responsibilities.

If the administrator determines that the grievance meets the jurisdictional requirements of Part 3, he shall:

- (1) appoint a hearing officer to adjudicate the complaint; and
- (2) set a date for the hearing that is either:
 - (a) not later than 30 days after the date the administrator issues his decision that the board has jurisdiction over the grievance; or
 - (b) at a date agreed upon by the parties and the administrator.

1989

67-19a-405. Prehearing conference.

(1) The administrator may require the presence of each party, the representatives of each party, and other designated persons at a prehearing conference.

(2) At the conference, the administrator may require the parties to:

- (a) identify which allegations are admitted and which allegations are denied;
- (b) submit a joint statement detailing:
 - (i) stipulated facts that are not in dispute;
 - (ii) the issues to be decided; and
 - (iii) applicable laws and rules;
- (c) submit a list of witnesses, exhibits, and papers or other evidence that each party intends to offer as evidence; and
- (d) confer in an effort to resolve or settle the grievance.

(3) At the conclusion of the prehearing conference, the administrator may require the parties to prepare a written statement identifying:

- (a) the items presented or agreed to under Subsection (2); and
- (b) the issues remaining to be resolved by the hearing process.

(4) The prehearing conference is informal and is not open to the public or press.

1989

67-19a-406. Procedural steps to be followed by aggrieved employee — Hearing before hearing officer — Evidentiary and procedural rules.

- (1) (a) The administrator shall employ a certified court reporter to record the hearing and prepare an official transcript of the hearing.

(b) The official transcript of the proceedings and all exhibits, briefs, motions, and pleadings received by the hearing officer are the official record of the proceeding.

(2) (a) *The agency has the burden of proof in all grievances resulting from dismissals, demotions, suspensions, written reprimands, reductions in force, and disputes concerning abandonment of position.*

(b) *The employee has the burden of proof in all other grievances.*

(c) *The party with the burden of proof must prove their case by substantial evidence.*

(3) (a) *The hearing officer shall issue a written decision within 20 working days after the hearing is adjourned.*

(b) *If the hearing officer does not issue a decision within 20 working days, the agency that is a party to the grievance is not liable for any claimed back wages or benefits after the date the decision is due.*

(4) *The hearing officer may:*

(a) *not award attorneys' fees or costs to either party;*

(b) *close a hearing by complying with the procedures and requirements of Title 52, Chapter 4, Open and Public Meetings Act;*

(c) *seal the file and the evidence produced at the hearing if the evidence raises questions about an employee's character, professional competence, or physical or mental health;*

(d) *grant continuances according to board rule; and*

(e) *decide questions or disputes concerning standing in accordance with Section 67-19a-301.*

1991

67-19a-407. Appeal to Career Service Review Board.

(1) (a) The employee or the agency may appeal the hearing officer's decision on a grievance to the board if:

- (i) the appealing party files a notice of appeal with the administrator within ten working days after the receipt of the decision or the expiration of the period for decision, whichever is first; and
- (ii) the appealing party meets the requirements for appeal established in Subsection (2).

(b) The appealing party shall submit a copy of the official transcript of the hearing to the administrator.

(2) The employee or the agency may appeal the hearing officer's decision on a grievance to the board only if the appealing party alleges that:

(a) the hearing officer did not issue a decision within 20 working days after the hearing adjourned;

(b) the appealing party is dissatisfied with the decision;

(c) the appealing party believes that the decision was based upon an incorrect or arbitrary interpretation of the facts; or

(d) the appealing party believes that the hearing officer made an erroneous conclusion of law.

1989

67-19a-408. Career Service Review Board hearing — Evidentiary and procedural rules.

- (1) The board shall:

- (a) hold a hearing to review the hearing officer's decision not later than 30 days after it receives the official transcript and the briefs;
 - (b) review the decision of the hearing officer by considering the official record of that hearing and the briefs of the parties; and
 - (c) issue its written decision addressing the hearing officer's decision within 40 working days after the record for its proceeding is closed.
- (2) In addition to whatever other remedy the board grants, it may order that the employee be placed on the reappointment roster provided for by Section 67-19-17 for assignment to another agency.
- (3) If the board does not issue its written decision within 40 working days after closing the record, the agency that is a party to the grievance is not liable for any claimed back wages or benefits after the date the decision is due.
- (4) The board may not award attorneys' fees or costs to either party.
- (5) The board may close a hearing by complying with the procedures and requirements of Title 52, Chapter 4, the Open and Public Meetings Act.
- (6) The board may seal the file and the evidence produced at the hearing if the evidence raises questions about an employee's character, professional competence, or physical or mental health. 1989

CHAPTER 19b

SUGGESTION AWARDS PROGRAM

(Repealed by Laws 1993, ch. 174, § 2.)

67-19b-101 to 67-19b-303. Repealed. 1993

CHAPTER 19c

EMPLOYEE RECOGNITION

Section

67-19c-101. Department award program.

67-19c-101. Department award program.

- (1) As used in this section:
 - (a) "Department" means the Department of Administrative Services, the Department of Agriculture, the Department of Alcoholic Beverage Control, the Department of Commerce, the Department of Community and Economic Development, the Department of Corrections, the Department of Employment Security, the Department of Environmental Quality, the Department of Financial Institutions, the Department of Health, the Department of Human Resource Management, the Department of Human Services, the Industrial Commission, the Insurance Department, the National Guard, the Department of Natural Resources, the Department of Public Safety, the Public Service Commission, the State Board of Education, the State Board of Regents, the State Tax Commission, and the Department of Transportation.
 - (b) "Department head" means the individual or body of individuals in whom the ultimate legal authority of the department is vested by law.
- (2) There is created a department awards program to award an outstanding employee in each department of state government.
- (3) (a) By April 1 of each year, each department head shall solicit nominations for outstanding employee of the year for his department from the employees in his department.

(b) By July 1 of each year, the department head shall:

- (i) select a person from the department to receive the outstanding employee of the year award using the criteria established in Subsection (c); and
 - (ii) announce the recipient of the award to his employees.
- (c) Department heads shall make the award to a person who demonstrates:
- (i) extraordinary competence in performing his function;
 - (ii) creativity in identifying problems and devising workable, cost-effective solutions to them;
 - (iii) excellent relationships with the public and other employees;
 - (iv) a commitment to serving the public as the client; and
 - (v) a commitment to economy and efficiency in government.
- (4) (a) The Department of Human Resource Management shall divide any appropriation for outstanding department employee awards that it receives from the Legislature equally among the departments.
- (b) If the department receives monies from the Department of Human Resource Management or if the department budget allows, the department head shall provide the employee with a bonus, a plaque, or some other suitable acknowledgement of the award.
- (5) (a) The department head may name the award after an exemplary present or former employee of the department.
- (b) A department head may not name the award for himself or for any relative as defined in Section 52-3-1.
- (c) Any awards or award programs existing in any department as of May 3, 1993, shall be modified to conform to the requirements of this section. 1993

CHAPTER 20

VOLUNTEER GOVERNMENT WORKERS ACT

Section

- 67-20-1. Short title.
- 67-20-2. Definitions.
- 67-20-3. Purposes for which volunteer considered a government employee.
- 67-20-4. Approval of volunteer.
- 67-20-5. Repealed.
- 67-20-6. Workers' compensation benefits.
- 67-20-7. Workers' compensation benefits for volunteer firefighters.

67-20-1. Short title.

This chapter is known as the "Volunteer Government Workers Act." 1996

67-20-2. Definitions.

As used in this chapter:

- (1) "Agency" means:
 - (a) any department, institution, office, college, university, authority, division, board, bureau, commission, council, or other agency of the state;
 - (b) any county, city, town, school district, or special improvement or taxing district;

ADDENDUM 4

(6) A person serving a probationary period may not use the grievance procedures provided in this chapter and in Title 67, Chapter 19a, Grievance and Appeal Procedures, and may be dismissed at any time by the appointing officer without hearing or appeal.

(7) Career service status shall be granted upon the successful completion of the probationary period. 1991

67-19-17. Reappointment of employees not retained in exempt position.

Any career service employee accepting an appointment to an exempt position who is not retained by the appointing officer, unless discharged for cause as provided by this act or by regulation, shall:

(1) be appointed to any career service position for which the employee qualifies in a pay grade comparable to the employee's last position in the career service provided an opening exists; or

(2) be appointed to any lesser career service position for which the employee qualifies pending the opening of a position described in Subsection (1) of this section. The director shall maintain a reappointment register for this purpose and it shall have precedence over other registers. 1979

67-19-18. Dismissals and demotions — Grounds — Disciplinary action — Procedure — Reductions in force.

(1) Career service employees may be dismissed or demoted only to advance the good of the public interest, and for just causes such as inefficiency, incompetency, failure to maintain skills or adequate performance levels, insubordination, disloyalty to the orders of a superior, misfeasance, malfeasance, or nonfeasance in office.

(2) Employees may not be dismissed because of race, sex, age, physical handicap, national origin, religion, political affiliation, or other nonmerit factor including the exercise of rights under this chapter.

(3) The director shall establish rules governing the procedural and documentary requirements of disciplinary dismissals and demotions.

(4) If an agency head finds that a career service employee is charged with aggravated misconduct or that retention of a career service employee would endanger the peace and safety of others or pose a grave threat to the public interest, the employee may be suspended pending the administrative appeal to the department head as provided in Subsection (5).

(5) (a) No career service employee may be demoted or dismissed unless the department head or designated representative has complied with this subsection.

(b) The department head or designated representative notifies the employee in writing of the reasons for the dismissal or demotion.

(c) The employee has no less than five working days to reply and have the reply considered by the department head.

(d) The employee has an opportunity to be heard by the department head or designated representative.

(e) Following the hearing, the employee may be dismissed or demoted if the department head finds adequate cause or reason.

(6) (a) Reductions in force required by inadequate funds, change of workload, or lack of work are governed by retention rosters established by the director.

(b) Under those circumstances:

(i) The agency head shall designate the category of work to be eliminated, subject to review by the director.

(ii) Temporary and probationary employees shall be separated before any career service employee.

(iii) (A) Career service employees shall be separated in the order of their retention points, the employee with the lowest points to be discharged first.

(B) Retention points for each career service employee shall be computed according to rules established by the director allowing appropriate consideration for proficiency and for seniority in state government, including any active duty military service fulfilled subsequent to original state appointment.

(iv) A career service employee who is separated in a reduction in force shall be:

(A) placed on the reappointment roster provided for in Subsection 67-19-17(2); and

(B) reappointed without examination to any vacancy for which the employee is qualified which occurs within one year of the date of the separation.

(c) (i) An employee separated due to a reduction in force may appeal to the department head for an administrative review.

(ii) The notice of appeal must be submitted within 20 working days after the employee's receipt of written notification of separation.

(iii) The employee may appeal the decision of the department head according to the grievance and appeals procedure of this act. 1991

67-19-19. Political activity of employees — Rules and regulations — Highway patrol — Hatch Act.

Except as otherwise provided by law or by rules promulgated under this section for federally aided programs, the following provisions apply with regard to political activity of career service employees in all grades and positions.

(1) State career service employees may voluntarily participate in political activity subject to the following provisions:

(a) if any state career service employee is elected to any partisan or full-time nonpartisan political office, that employee shall be granted a leave of absence without pay for times when monetary compensation is received for service in political office;

(b) no officer or employee in career service may engage in any political activity during the hours of employment, nor may any person solicit political contributions from employees of the executive branch during hours of employment for political purposes; and

(c) partisan political activity may not be a basis for employment, promotion, demotion, or dismissal, except that the director shall adopt rules providing for the discipline or punishment of a state officer or employee who violates any provision of this section.

(2) (a) Notwithstanding any other provision of this section, no member of the Utah Highway Patrol may use his official authority or influence for the purpose of interfering with